

STATE OF MINNESOTA
OFFICE ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Penalty
Order Issued to Richard Rhodes and ICD
Builders, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for a prehearing conference before Administrative Law Judge Kathleen D. Sheehy on November 15, 2005, at 1:30 p.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. The record closed at the conclusion of the prehearing conference.

Jennifer Beens Harper, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Department of Labor and Industry (the Department).

There was no appearance by or on behalf of the Respondents, Richard Rhodes and ICD Builders, Inc., 701 33rd Avenue North, No. 117, Fargo, ND 58102.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 144.991, subd. 5, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Director of Legal Services, Minnesota Department of Labor and Industry, 443 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

The issue presented in this case is whether the Department properly issued an Administrative Penalty Order to the Respondents because:

(1) Respondents installed plumbing at a private residence in Moorhead, Minnesota, without being licensed to perform plumbing in Minnesota, in violation of Minn. Stat. § 326.40, subd. 1;

(2) Respondents failed to file a plumbing code compliance bond with the Commissioner of Health, in violation of Minn. Stat. § 326.40, subd. 2;

(3) Respondents violated the Minnesota plumbing code by using a no-hub coupling to connect dissimilar materials for a lavatory trap arm, in violation of Minn. R. 4715.0860, subp. 6; by failing to ensure that a proper trap and venting were verified, in violation of Minn. R. 4615.0900 and 4715.0920; and by failing to comply with clearance requirements for water closets, in violation of Minn. R. 4715.1220, subp. 1.

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On April 26, 2005, the Minnesota Department of Health issued an Administrative Penalty Order (APO) to the Respondents based on violations alleged to have occurred in connection with plumbing work performed at a private residence in Moorhead, Minnesota. The APO required Respondents to perform certain corrective actions within 30 days of receipt of the Order and assessed a forgivable penalty of \$5,500 and a non-forgivable penalty of \$2,670. The forgivable penalty would have been forgiven if Respondents had completed the required corrective actions.

2. The Department of Health received a timely request from Respondents for a contested case hearing to review the APO.

3. Effective May 16, 2005, the Plumbing and Engineering Unit of the Department of Health became part of the Department of Labor and Industry pursuant to Executive Order of the Governor of Minnesota.

4. On August 25, 2005, the Commissioner of Labor and Industry issued a Notice and Order for Prehearing Conference. On August 31, 2005, the Department served the Notice and Order for Prehearing Conference on the Respondents by first-class mail addressed to Richard Rhodes, ICD Buildings, Inc., 701 33rd Avenue North, No. 117, Fargo, ND 58102.^[1]

5. The Prehearing Conference was scheduled to take place by telephone, initiated by the Administrative Law Judge, at 1:30 p.m. on September 28, 2005.

6. On September 28, 2005, at 1:30 p.m., the Administrative Law Judge telephoned Mr. Rhodes at 218/329-7210, the number previously used by the Department to contact him. He did not answer the telephone. The Administrative Law

Judge left him a message that he should return the call as soon as possible or the Department would likely move to dismiss the hearing.

7. Later that afternoon, Mr. Rhodes called the Administrative Law Judge and said he had received the message but did not often use that phone number. He provided a different phone number, 218/329-1697, which he said was a better number at which to reach him. The Administrative Law Judge directed him to contact counsel for the Department to schedule another time for a telephone prehearing conference and provided the new phone number to counsel for the Department to facilitate that process.

8. Beginning on September 29, 2005, Counsel for the Department attempted to reach Mr. Rhodes by telephone several times to reschedule the prehearing conference and left messages at both the new telephone number and the original telephone number provided by Mr. Rhodes. He did not return any of these telephone calls.^[2]

9. On October 5, 2005, counsel for the Department wrote to Mr. Rhodes and asked him to leave her a message providing convenient dates and times for a prehearing conference.^[3] Mr. Rhodes did not respond to this letter.

10. On October 19, 2005, counsel for the Department wrote to Mr. Rhodes detailing her efforts to contact him and notifying him that if she did not hear from him by October 28, 2005, the Department would move for an order of dismissal, in which event the Administrative Penalty Order issued by the Department would become the final Order of the Commissioner. She also indicated the Department may file a petition in district court requesting that a judge issue an order directing him to comply with the APO, pay the penalty, and arrange for a licensed plumber to correct the violations noted in the APO.^[4] Mr. Rhodes did not respond to this letter.

11. On November 1, 2005, the Administrative Law Judge wrote to the parties and informed Mr. Rhodes that the prehearing conference was rescheduled to take place at 1:30 p.m. on November 15, 2005, at the Office of Administrative Hearings in Minneapolis. The letter further notified Mr. Rhodes that if he failed to appear at the prehearing conference, or to contact the Administrative Law Judge by November 10, 2005, to make different arrangements, he would be considered to be in default.^[5]

12. Mr. Rhodes failed to contact the Administrative Law Judge to make different arrangements, and he failed to appear at the prehearing conference on November 15, 2005.

13. The Respondents have failed to prosecute this matter and are in default of their obligation, having requested a hearing, to appear and properly contest the APO.

14. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Prehearing Conference at paragraphs 1-4 are hereby taken as true and incorporated into these Findings of Fact.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 144.99, 144.991, and Executive Order of the Governor of Minnesota.

2. The Notice and Order for Prehearing Conference issued by the Department was proper, and the Department has fulfilled all relevant procedural requirements of law and rule.

3. The Commissioner of Health has authority to enforce violations of Minn. Stat. § 326.40 and rules adopted by the Department for the preservation of public health.^[6] The Commissioner may issue an order requiring violations to be corrected and administratively assessing monetary penalties for violations of statute or rule.^[7] A person subject to an administrative penalty order may request an expedited hearing to review the commissioner's action. The Commissioner must notify the person to whom the order is directed of the time and place of the hearing at least 15 days before the hearing. The expedited hearing must be held within 30 days after a request for hearing has been filed with the Commissioner unless the parties agree to a later date.^[8]

4. The Respondent has failed to prosecute this matter and is in default of his obligation, having requested a hearing, to appear and contest the APO. Pursuant to Minn. R. 1400.6000, the allegations contained in the Statement of Charges are hereby taken as true.

4. By engaging in unlicensed plumbing activity in Minnesota, the Respondent violated Minn. Stat. §§ 326.40, subd. 1.

5. By failing to file a plumbing code compliance bond with the Commissioner of Health, the Respondent violated Minn. Stat. § 326.40, subd. 2.

6. The Respondents violated various provisions of the Minnesota plumbing code in connection with work done in Moorhead, Minnesota, including Minn. R. 4715.0860, subp. 6 (use of no-hub coupling to connect dissimilar materials); Minn. R. 4615.0900 and 4715.0920 (proper trap and venting could not be verified for shower drain); and Minn. R. 4715.1220, subp. 1 (water closet lacked proper clearances).

7. The Department of Health properly issued the APO against the Respondents.

Based on the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Labor and Industry affirm the Administrative Penalty Order issued against the Respondents.

Dated this 18th day of November, 2006

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Default

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

^[1] Notice and Order for Prehearing Conference and Affidavit of Service of Kathleen Davis, dated August 31, 2005.

^[2] Letter dated October 5, 2005, from Jennifer Beens Harper to Richard Rhodes and ICD Builders, Inc.

^[3] *Id.*

^[4] Letter dated October 19, 2005, from Jennifer Beens Harper to Richard Rhodes and ICD Builders, Inc.

^[5] Letter dated November 1, 2005, from the Administrative Law Judge to Jennifer Beens Harper and Richard Rhodes and ICD Builders, Inc.

^[6] Minn. Stat. § 144.99, subd. 1.

^[7] Minn. Stat. §144.99, subd. 4.

^[8] Minn. Stat. § 144.991, subd. 5. There is no information in the record as to when the Respondents requested a hearing or of any agreement concerning the timing of the hearing; however, as the Respondents have failed to respond to efforts to schedule the hearing and have failed to appear at the prehearing conference, any issues concerning timing are immaterial.